IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 706

CITY OF CHICAGO, a Municipal Corporation, BOARD OF HEALTH OF THE CITY OF CHICAGO, DR. ROBERT A. BLACK, Health Commissioner and Acting President of Board of Health of the City of Chicago,
Petitioners,

vs.

FIELDCREST DAIRIES, INC.,
Respondent.

REPLY BY PETITIONERS TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Reply to Plaintiff's Preliminary Statement.

The plaintiff says (p. 5) that the decision by the Circuit Court of Appeals is "of local interest only and does not present a question of such importance as justifies the awarding of the writ of certiorari." It would seem that any decision by a federal court which cuts down the powers of a municipality as large as the City of Chicago to regulate the public health is extremely important; and, as noted in the defendants' original brief (pp. 35-36), this par-

ticular decision affects the regulatory powers of all Illinois municipalities.

The plaintiff says (p. 5): "No conflict with Illinois decisions is shown, and in fact none exists." This is not true. The decision conflicts not only with settled rules of statutory construction stated in Illinois decisions but with the holding in *City of Ottawa* v. *Brown*, 372 Ill. 468 (1939); see defendants' brief, pp. 30-33. It also conflicts with the plain language of the saving clause of the 1939 statute cited and discussed in the defendants' brief (pp. 24-28). There is not a single Illinois decision which supports the decision of the Circuit Court of Appeals; none of the cases relied on by the Circuit Court of Appeals or by the plaintiff in its brief contained a saving clause as did the 1939 statute involved here.

It is said (plaintiff's brief, p. 5) that if the opinion of the Circuit Court of Appeals was wrong in interpreting the statute, "the Illinois legislature can correct it." The defendants' contention is that the lower court has disregarded the plain language used by the Illinois legislature. In so doing it applied a rule of law that has no application here in view of the statutory language. The effect of the decision is thus to enunciate a new principle of the law of municipal corporations, the principle being that, no matter how extensive the legislative grant of municipal power may be, the municipality may not forbid what the state acting through the legislature does not forbid. It is difficult to see how the legislature could have been any more emphatic than when it said, "Nothing in this act shall impair or abridge the power" of cities to regulate the distribution of milk. The situation created by the Circuit Court of Appeals in disregarding this language is one that can be effectively corrected only by a court of review.

Reply to Plaintiff's Point I.

The plaintiff says (p. 7) that "the *defendants* submitted in the trial court and in the Circuit Court of Appeals the question" of whether or not the 1939 statute deprived the city of power to forbid the use of paper milk containers. It seems likely that the word "defendants" is used inadvertently for the word "plaintiff," although the record does not show clearly how the question was first raised. The plaintiff complains that the defendants now contend for the first time that the courts below should not have decided the question.

The question of the city's power under the 1939 statute was not raised in the complaint, for when the complaint was filed in February, 1939 the 1939 statute had not become effective. The only indication in the record about how the question was first raised is the statement in the master's report (R. 1732) that the "plaintiff refers" to the statute. The master disposed of the point with one sentence. Similarly the opinion of the trial court discussed the point in only one sentence (R. 1756). The findings of fact, the conclusions of law, and the decree of the trial court (R. 1756-1761) do not find or decide that the ordinance is in conflict with the 1939 statute, but merely say that the plaintiff's containers conform with the provisions of the statute. The Circuit Court of Appeals then based its decision against the defendants on a holding that the city's power was impaired by the 1939 statute, although the two majority judges also indicated that they considered the ordinance unconstitutional. The substantial questions raised by the pleadings in this case were the construction of the ordinance as including or excluding paper milk containers and the validity of the ordinance as a reasonable exercise

of the police power. The new issue as to the city's power under the 1939 statute emerged as a substantial question for the first time in the majority opinion of the Circuit Court of Appeals. For this reason the application of the rule announced in *Railroad Commission of Texas* v. *Pullman Company*, 312 U. S. 496 (1941), has not been urged before. Nevertheless the defendants urge this court to review and decide on the merits the local question of the city's power (see brief, pp. 36-38).

The plaintiff says (brief, pp. 7-9) that the *Pullman Company* case is "not authority in the present proceeding" because there the Texas statute provided for a statutory method of appeal from the administrative order attacked in the federal courts. The only importance of that factor in the case was that, unlike some administrative orders, the order was appealable under the state statute. So here, if the plaintiff had filed its suit in an Illinois state court of first instance and had been unsuccessful, it could have appealed to Illinois courts of review under section 74 of the Illinois Civil Practice Act (Ill. Rev. Stat. 1941, ch. 110, sec. 198). Moreover, the *Pullman Company* case is merely one of a number of decisions applying the principle stated in the opinion by Mr. Justice Frankfurter:

> "Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies, whether the policy relates to the enforcement of the criminal law, . . . or the final authority of a state court to interpret doubtful regulatory laws of the state . . ."

This principle, clearly applicable here, was applied in *Hawks* v. *Hamill*, 288 U. S. 52 (1933), cited in the defendants' brief (pp. 36, 38) and not mentioned in the plaintiff's brief.

Reply to Plaintiff's Point II.

Outstanding is the fact that the plaintiff does not deny that the holding of the lower court means that the city's power under the 1939 statute is less than it was before. The holding means that the city's power *was* impaired by the statute, although the saving clause in section 19 of the statute says expressly, "*Nothing in this act shall impair or abridge the power of any city . . . to regulate . . . the . . . distribution of . . . milk . . .*". Moreover:

(a) The plaintiff does not deny that the broad power of the city to regulate the milk industry under the Cities and Villages Act of 1872 included the power to forbid the use of paper milk containers (see defendants' brief, pp. 20-24).

(b) The plaintiff does not discuss the meaning of the particular words in the saving clause. These words state emphatically and unmistakably that the power of the city under the 1939 statute is the same as it was under the 1872 statute (except for the inapplicable proviso). See defendants' brief, pp. 26-27.

(c) The plaintiff does not answer the defendants' contention (pp. 24-25) that, since the saving clause and the title of the statute are in identical terms, the saving clause is as broad as language could make it and, whatever aspect of the milk industry is regulated by the statute, the legislature has said expressly that the city retains its power to regulate.

(d) The plaintiff does not answer the defendants' contention (brief, pp. 25-26) that the proviso in the saving clause evidences a legislative intention that only matters within the proviso are excepted from the broad operation of the saving clause under the rule, *expressio unius est exclusio alterius*, and consequently the power to forbid the use of paper milk containers is retained.

(e) The plaintiff does not answer the defendants' contention (brief, pp. 29-30) that the Circuit Court of Appeals found that the ordinance conflicts, not with the entire statute, but with a part of it; and that the

court's reasoning was basically fallacious in considering the effect of a part of the statute on the city's power *before* it considered the meaning of the clause that preserves the city's power. In fact the plaintiff commits the same error: *before* considering the meaning of the saving clause (plaintiff's brief, pp. 31-41), the plaintiff (brief, pp. 13-31) argues and concludes that the ordinance conflicts with the statute. There is no conflict between the ordinance and the statute when the statute is considered as a whole.

The plaintiff (p. 13) attempts to discredit the pertinency here of *Koy* v. *City of Chicago*, 263 Ill. 122 (1914). The holding in that case, as that of the Circuit Court of Appeals here, had far-reaching effects in that it showed the extent (there held broad) of the power of cities to regulate the milk industry. The *Koy* case was so described by the Circuit Court of Appeals in its opinion (R. 1792), where it speaks of "the broad field of regulation which it (the city) had theretofore had as recognized in *Koy* v. *City of Chicago*, 263 Ill. 122."

Similarly *City of Ottawa* v. *Brown*, 372 Ill. 468 (1939), is of vital importance here as indicating the attitude of Illinois courts in construing legislative grants of municipal power. The plaintiff says that the opinion is completely devoid of language which "by any stretch of the imagination" could be construed to bear on the issues in the present case. There, as here, the City of Ottawa had a power to regulate under the 1872 Cities and Villages Act. There, as here, the state began to regulate. There, as here, the statute contained a saving clause. And there, as should have been held here, the Illinois Supreme Court held that the pre-existing power of the city was retained by the saving clause, although the same claims of conflict between city and state regulation could be made as are made here.

City of Rockford v. *Hey*, 366 Ill. 526 (1937), discussed at some length by the plaintiff (brief, pp. 14-15, 29-31), was neither relied on or cited by the Circuit Court of Appeals. It has no bearing here. The case held invalid an ordinance that required ice cream makers to pay a license fee to the City of Rockford for inspection of their factories *in other cities*. Here the plaintiff was not refused a permit to sell milk in Chicago because its plant outside of Chicago does not comply with Chicago regulations, but because the plaintiff seeks to sell milk in Chicago in a manner forbidden by the ordinance. Here the ordinance reads, ". . . milk sold in quantities of less than one gallon shall be delivered in standard milk bottles" and operates only within the city.

The plaintiff says that the constitutional question is not involved at this stage of the litigation and denies (brief, p. 15) that the opinion of the Circuit Court of Appeals contains a dictum that the ordinance is an unreasonable exercise of the police power. The discussion in the majority opinion (R. 1794) of a number of matters that relate only to the constitutionality of the ordinance clearly amounts to a dictum that the ordinance is an unreasonable exercise of the police power. These statements about such a delicate question as the validity of a health regulation under the fourteenth amendment constitute a precedent of far-reaching effect on the power of courts to invalidate health regulations under the fourteenth amendment and would alone seem to be a sufficient ground to require this court to exercise its power of review.

Moreover, the plaintiff makes many statements that can be addressed only to the question of the unreasonableness of the ordinance. The plaintiff speaks of the fitness of paper milk containers for the "prevention of disease" and of "their other benefits" (brief, p. 6) and argues that the

use of paper milk containers in Chicago since the entry of the injunction in the trial court indicates that they do not present a hazard to health (brief, pp. 6, 13; obviously this fact is not shown in the record). Also the plaintiff speaks of the "injustice" of permitting the city to forbid the use of paper containers, saying that "the *supposed* judgment of fifty aldermen" (italics are the plaintiff's) is aligned against the Chicago Board of Health, the Illinois General Assembly, the Director of the Illinois Department of Health, and the United States Public Health Service (plaintiff's brief, p. 43). For a complete answer to the plaintiff's statement, see the defendants' brief (pp. 49-57).

The plaintiff (pp. 22-28) cites many Illinois cases in which the rule was applied that an ordinance is invalid when it conflicts with a state statute or a public policy expressed in a state statute. This is a rule of statutory construction only, as is apparent from the cases cited. In not one of these cases did the statute involved contain an operative saving clause retaining unimpaired the powers of municipalities, as does section 19 of the 1939 Milk Pasteurization Act.

In view of the broad language of the saving clause it is immaterial whether the ordinance and the 1939 statute conflict. In fact, however, they do not conflict. The plaintiff discusses the statute at length (brief, pp. 17-21, 41-43) in an attempt to establish a conflict. The sections of the statute and the regulations of the Department of Health merely contain some provisions *about* paper milk containers. They do not say that paper milk containers must be permitted, but merely recognize and regulate their use. The plaintiff's statement (pp. 42-43) that the State of Illinois "makes it illegal" for the plaintiff to sell milk in any way but in paper containers is clearly wrong.

It may be that the plaintiff has no equipment to package milk in glass containers and that the state regulations would forbid the use of paper-container equipment for filling glass containers. But the state does not prevent the plaintiff from using other equipment to fill glass containers nor from selling milk in glass containers.

In discussing the rule that the statute controls where there is a conflict between a statute and an ordinance, the plaintiff, as did the Circuit Court of Appeals (R. 1791), quotes from 2 McQuillin on Municipal Corporations (2d Ed. 1928) 572, but does not quote the entire sentence. The word "established" at the end of the plaintiff's quotation (p. 25) is not followed by a period but by a comma and, after saying that an ordinance may not be contrary to a public policy expressed in legislation, the text continues with the following words:

> "unless there is a specific, positive, lawful grant of power by the state to the municipality to ordain otherwise, in which event the specific, positive, lawful grant is from the same source of authority that made and has been expressed through legislation the policy of the state."

This important clause not only shows that the problem is one of statutory construction, but applies expressly to the "specific, positive, lawful grant" of power to the city in the saving clause.

The plaintiff also quotes (p. 25) from 43 Corpus Juris 215-17, section 219, which states the general rule about conflicting ordinances and statutes. A more specific discussion in section 220 (pp. 218-220) shows that there is no conflict in the present case:

> "The rule that a municipal ordinance in conflict with a state law is void does not apply unless the state law with which the particular ordinance conflicts is

intended to apply, and is, in fact, applicable and imperative in the particular municipal corporation in which such ordinance has been enacted" (43 Corpus Juris 219).

"The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creates no conflict therewith, unless the statute limits the requirement for all cases to its own prescriptions" (43 Corpus Juris 219-220).

In several places, in discussing the saving clause, the plaintiff says that it means that the powers of the City of Chicago are unimpaired "except to the extent that the State by and pursuant to the 1939 milk act occupies the field of milk regulation" (brief, p. 33; see also p. 39). This statement conflicts even with the interpretation of the saving clause in the majority opinion of the Circuit Court of Appeals, which said:

"The purpose of the saving clause, in our judgment, was to preserve in the city the unquestioned right to continue *in a field which had been entered by the state, and in which, thereafter, each should have co-extensive power and authority.*". (Italics added.)

The plaintiff also says (p. 32):

"The statute cannot be construed to mean (and we do not understand the defendants to so contend) that specific matters shall be subject to determination by both the state and by the city and at one and the same time. That would mean chaos, . . ."

What the plaintiff means by "subject to determination" is not clear. Certainly it is competent for the legislature to provide that state health officers and municipal health officers may regulate the same specific matters at the same time. This would not mean "chaos." In many jurisdictions there are constitutional and statutory provisions that expressly give municipalities local home rule over many matters that are regulated by the state. In fact, section 19

of the 1939 Milk Pasteurization Act merely preserves the "home rule" provisions as to milk regulations contained in the 1872 Cities and Villages Act.

The only answer made by the plaintiff to the defendants' analysis of the saving clause is an argument (brief, pp. 36-39) that the defendants' construction of the saving clause means that the statute "is applicable only to rural areas and other small communities" and has only "a limited territorial application"; and the plaintiff then argues that such a construction is untenable. The plaintiff does not correctly state the defendants' contention. The defendants' contention is that the statute is designed to prescribe minimum sanitary standards which are effective throughout the state, both in rural and urban communities. But the statute indicates no intention to go further and occupy exclusively the entire field of regulation. On the contrary, the saving clause says expressly that municipalities may continue to make regulations as broad in scope and as stringent as those authorized under the 1872 statute, so long as the municipal regulations do not fall below the minimum standards fixed by the state. In other words, the statute places a floor under municipal milk regulations.

Conclusion.

This case presents a simple problem. The 1872 statute gave the city power to forbid the use of paper milk containers. The 1939 statute said expressly that nothing therein impairs the power of cities. The words in the saving clause can mean only what they say and the city still has power to forbid the use of paper milk containers. The Circuit Court of Appeals holds that the saving clause is meaningless, as the dissenting opinion points out. This

error and the importance of the case to Illinois municipalities call for the exercise of this court's power of review.

Respectfully submitted,

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BOARD OF HEALTH OF THE CITY OF CHICAGO,
DR. ROBERT A. BLACK, Health Commissioner and Acting President of Board of Health of the City of Chicago,

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